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No. 02-323

In the Supreme Court of the United States

NDCHEALTH CORPORATION AND SUBSIDIARIES,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the leasehold improvements made by petitioner come within the "world headquarters" exception to the repeal of the investment tax credit under Section 204(a)(7) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2155.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 291 F.3d 1381. The opinion of the United States Court of Federal Claims (Pet. App. 3a-29a) is reported at 50 Fed. Cl. 24.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2002. The petition for a writ of certiorari was filed on August 28, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to 1986, Congress had provided an income tax credit for certain types of business investment

spending. Although Congress generally repealed the investment tax credit in enacting the Tax Reform Act of 1986, Pub. L. No. 99-514, § 211(a), 100 Stat. 2166, as part of that repeal Congress provided "transitional rules" that continued to permit the investment tax credit to be claimed in narrowly drawn situations. One of these transitional rules is the "world headquarters" exception, which allows an investment tax credit for certain property placed in service by a taxpayer after 1985 if:

> (A) the lessee or an affiliate is the original lessee of each building in which such property is to be used,
>
> (B) such lessee is obligated to lease the building under an agreement to lease entered into before September 26, 1985, and such property is provided for such building, and
>
> (C) such buildings are to serve as world headquarters of the lessee and its affiliates.

§ 204(a)(7), 100 Stat. 2155. This provision further specifies that "[s]uch lessee shall include a securities firm that meets the requirements of subparagraph (A), except the lessee is obligated to lease the building under a lease entered into on June 18, 1986." *Ibid.*

2. On April 21, 1973, petitioner entered into a "Lease Agreement" for a building located at One NDC Plaza in Atlanta, Georgia. Pet. App. 4a-5a. The agreement provided that petitioner (then known as National Data Corporation) "does hereby lease, demise, and rent from Lessor, the entire four-story office building to be constructed by Lessor" for a 20-year term. C.A. App. 25. On that same date, the parties entered into a "First Amendment to Lease Agreement," which established April 27, 1973, as the commencement date of the 20-

year lease. C.A. App. 54, 56. Petitioner was the original lessee of One NDC Plaza, and the building served as petitioner's "world headquarters" as that term is used in Section 204(a)(7) of the Tax Reform Act of 1986. Pet. App. 4a-5a, 9a.

During its 1987-1990 tax years, petitioner placed approximately $35 million in leasehold improvements, equipment, furniture and fixtures in service at One NDC Plaza. Pet. App. 5a. Petitioner did not claim an investment tax credit for these leasehold improvements on its corporate income tax returns for these years. *Ibid.*

On August 8, 1994, however, petitioner filed an amended return that claimed investment tax credits for its leasehold improvements to One NDC Plaza. Petitioner sought a refund for the four tax years at issue of approximately $1.7 million. Pet. App. 5a-6a. When the Internal Revenue Service disallowed the refund claims, petitioner brought this refund suit in the Court of Federal Claims. *Id.* at 6a.

3. The Court of Federal Claims agreed with the United States that petitioner failed to qualify for the "world headquarters" exception to the repeal of the investment tax credit. Pet. App. 4a. The court noted that the term "agreement to lease," as used by Congress in Section 204(a)(7)(B) of the Tax Reform Act, is not synonymous with the term "lease." Pet. App. 9a-18a. The court held that, in enacting Section 204(a)(7)(B), Congress created a narrow exception to the repeal of the investment tax credit that is available only to the small number of taxpayers who, prior to September 26, 1985, had entered into an "agreement to lease" property to serve as the taxpayer's world headquarters and who then executed a lease after that date. Pet. App. 19a-25a.

The court noted that the contrary position advocated by petitioner would make the exception provided in Section 204(a)(7)(B) broadly available to any taxpayer that had entered into a lease for its world headquarters at any time prior to September 26, 1985. Pet. App. 23a. The court held that petitioner did not qualify for the "world headquarters" exception because petitioner had actually leased its world headquarters, and had not executed merely an "agreement to lease" the premises, in 1973. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-2a. The court agreed with the trial court's interpretation of the phrase "'agreement to lease' in subparagraph (B) of § 204(a)(7)" and "adopt[ed] the Court of Federal Claims application of such interpretation to the facts of this case." Pet. App. 2a.

ARGUMENT

The issue addressed in this case lacks any substantial recurring importance because it arises under a "transitional" tax provision that applies to activity that occurred prior to 1986. The decision of the court of appeals is, in any event, correct. Further review is therefore not warranted.

1. Section 204(a)(7) is a "transitional rule" that was enacted as part of, and to provide a limited exception to, the general repeal of the investment tax credit. Courts have routinely recognized that the transitional rules established in the Tax Reform Act of 1986 were narrowly drawn and were intended to have limited application. See, *e.g.*, *Apache Bend Apartments, Ltd.* v. *United States*, 987 F.2d 1174, 1175 (5th Cir. 1993) (en banc). This understanding of the intended scope of the transitional rules flows not only from their text and history but also from the general principle that

"provisions granting special tax exemptions are to be strictly construed." *Helvering* v. *Northwest Steel Rolling Mills, Inc.*, 311 U.S. 46, 49 (1940).

In particular, the narrow exception to the general repeal of the investment tax credit provided by Section 204(a)(7) is available only when several carefully drawn conditions are met. To qualify for this exception, the taxpayer must, prior to September 26, 1985, have made an "agreement to lease" a building or buildings as the original lessee, and the buildings must be intended "to be used" or "to serve" as the "world headquarters" of the lessee and its affiliates. Pet. App. 8a. These conditions are highly restrictive. For example, in *United States* v. *Kjellstrom*, 100 F.3d 482, 484-485 (7th Cir. 1996), the court held that the taxpayer was not entitled to relief under this provision (i) because it lacked "affiliates" and (ii) because the office could not be the taxpayer's *world* headquarters when the company had no other offices.

The use of the term "agreement to lease" as opposed to the term "lease" in Section 204(a)(7)(B) constitutes an express restriction on the availability of this transitional rule. Although the term "agreement to lease" is not defined in the statute, that term is commonly employed to refer to an executory contract, rather than to an actual lease creating a leasehold interest. See, *e.g.*, *Sands* v. *United States*, 198 F. Supp. 880, 883 (W.D. Wash. 1960) (drawing a distinction between "agreement to lease" and "lease"), aff'd *sub nom. First Federal Sav. & Loan Ass'n* v. *United States*, 295 F.2d 481 (9th Cir. 1961). As the court stated in *Ryan* v. *Stanger Inv. Co.*, 620 S.W.2d 505, 508 (Tenn. Ct. App. 1981), "[a]n agreement to lease is not a lease, just as a contract to sell is not a sale." The distinction between these two concepts is well established: "The distinction is that a lease is a

transaction that is already partially executed, while a contract to lease creates obligations that are purely executory." 2 R. Powell, *Powell on Real Property* § 16.02[4] (M. Wolf ed. 2000). This distinction is often important, for example, in determining the appropriate relief upon a breach by one of the parties. See *ibid.*

The text of this transitional rule reflects that Congress understood the difference between the terms "lease" and "agreement to lease" in drafting Section 204(a)(7)(B). When Congress meant to refer to a "lease," rather than to an "agreement to lease," it expressly used that different term. The last sentence of Section 204(a)(7) provides a limited expansion of the transitional rule for a "securities firm that meets the requirements of subparagraph (A), except the lessee is obligated to lease the building *under a lease entered into on June 18, 1986.*" If Congress had intended the term "lease" in this limited expansion of the "transitional" rule to have the same meaning as the term "agreement to lease" in subparagraph (B), it would presumably have used the same term in both places. When, as here, Congress employs different terminology in two portions of the same statute, the difference in these terms is to be given its ordinary consequence and effect. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of terms) (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). See *Platt* v. *Union Pacific R.R.*, 99 U.S. 48, 58 (1878) ("a legislature is presumed to have used no superfluous words"); 2A N. Singer, *Statutes and Statutory Construction* § 46.06, at 194 (West 6th ed. 2000) ("when the legislature uses certain language in one part of the statute and different

language in another, the court assumes different meanings were intended") (footnote omitted).

Other portions of this same statute support this conclusion. In subparagraph (A) of the statute, Congress referred to the "building in which such property is *to be used*," and in subparagraph (C) it restricted the statute's application to "such buildings *are to serve* as world headquarters of the lessee and its affiliates." As the Court of Federal Claims noted, this language "suggests that the statute was intended to cover only a company that had obligated itself to lease a building in the future, but had not yet occupied the structure." Pet. App. 19a n.12. See *United States* v. *Kjellstrom*, 916 F. Supp. 902, 907 (W.D. Wis. 1996) (the use of the words "are to serve" in subparagraph (C) is "evidence that the drafters envisioned the building would serve as a world headquarters at some point in the future"), aff'd on other grounds, 100 F.3d 482 (7th Cir. 1996); *Payless Cashways, Inc.* v. *Commissioner*, 114 T.C. 72, 79 (2000) ("the words * * * 'such buildings are to serve as world headquarters', are prospective").

As the courts below concluded, the use of the term "agreement to lease" coupled with the prospective language "is to be used" and "are to serve" demonstrates that Congress intended to provide a narrow exception that is available only to those taxpayers who, prior to September 26, 1985, entered into an agreement to lease premises that were to serve as their world headquarters, but who had not entered into an actual lease of the premises until after that date. Petitioner executed a "Lease Agreement" with respect to its world headquarters prior to September 26, 1985, but prior to that date it also executed a lease for the building and began occupying it. Pet. App. 4a-5a. The courts below therefore correctly concluded that this narrow "transi-

tional" rule is not available to petitioner in this case. *Id.* at 1a-2a.

Petitioner incorrectly contends that the decision in this case conflicts with "a long line of Supreme Court precedent establishing the proper use of legislative history in statutory construction." Pet. 13. The Court of Federal Claims based its decision on the language of the statute, and the court of appeals affirmed based on the reasoning of that decision. Pet. 2a, 9a-18a. These courts viewed the legislative history as confirming, rather than overriding, their interpretation of the text of the statute. *Id.* at 19a-29a.

2. As petitioner notes (Pet. 8), the Ninth Circuit reached a different conclusion in *Airborne Freight Corp.* v. *United States*, 153 F.3d 967 (1998).* The court held in that case that a taxpayer may obtain the benefit of the transitional rule even if it actually leased and occupied the building prior to September 1985. *Id.* at 970. As the court emphasized in *Airborne Freight*, however, the issue addressed in these cases is not a matter of recurring importance to the administration of the tax laws (*id.* at 971):

> Other companies that leased their world headquarters decades ago cannot have had their expectations defeated as they entered and originally equipped their buildings long before the repeal of the investment credit. Moreover, the opportunity for other taxpayers to take advantage of the world headquarters exception expired, at the latest, on January 1, 1991. *See* § 203(b)(2)(A) [of the Tax

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* The taxpayer filed a petition for a writ of certiorari on a different issue on which the government had prevailed in the court of appeals in *Airborne Freight*. The Court denied that petition. 526 U.S. 1112 (1999).

Reform Act of 1986, *supra*]. The exception remains a narrow and temporally limited one.

As the court emphasized in *Airborne Freight*, this transitional rule is not available to any taxpayer who places leasehold improvements or other qualifying property in service in a leased world headquarters after January 1, 1991. Tax Reform Act of 1986, § 203(b)(2)(A), 100 Stat. 2144. Indeed, there is only one other case pending in the courts that involves the same issue presented in this case. Moreover, the Internal Revenue Service is unaware of any other cases pending administratively that involve this issue. And, because this transitional rule can apply only for property placed in service prior to 1991, it is manifestly unlikely that any additional cases involving this narrow statutory question will hereafter arise in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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